# District of Columbia
# Office of the State Superintendent of Education
## Office of Review and Compliance
## Student Hearing Office

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STUDENT HEARING OFFICE
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**Confidential**

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| STUDENT[1], by and through his Parent<br><br>Petitioners,<br><br>v.<br><br>District of Columbia Public Schools<br><br>Respondent. | HEARING OFFICER'S DETERMINATION<br><br>January 15, 2010<br><br>Representatives:<br><br>Counsel for Petitioners:<br>Nakisha Winston, Esq.<br><br>Counsel for DCPS:<br>Tonya Chor, Esq.<br><br>Hearing Officer:<br>Kimm H. Massey, Esq. |

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

## II. PROCEDURAL BACKGROUND

On October 8, 2009, Petitioner filed its Complaint against DCPS. Instead of listing in the Complaint the issues presented, the relevant factual background, and the relief requested, Petitioner included these items and various legal arguments in a 31 page, single-spaced letter that it attached to the Complaint. In the letter, Petitioner asserted that DCPS violated IDEIA and failed to provide Student with a free appropriate public education ("FAPE") by: 1) violating procedures for initial evaluation, 2) violating the reevaluation timelines, 3) violating evaluation procedures, 4) violating requirements regarding review of evaluation data, 5) violating procedures for determination of eligibility, 6) failing to create an appropriate IEP, 7) failing to appropriately implement Student's IEP, 8) failing to ensure the IEP team included the required persons, 9) violating the requirements for parent participation, 10) violating the requirements for development, review and revision of Student's IEP, 11) failing to identify Student's communication impairment, 12) violating Child Find, 13) failing to make the required findings when determining the existence of a specific learning disability, 14) violating the requirements for specific documentation for the eligibility determination, 15) violating the requirements for educational placement determinations, 16) violating by not providing sufficient prior notice, 17) violating the discipline procedures, and 18) violating the procedures for the determination of interim alternative education setting.[2] DCPS filed it Response to Petitioner's Complaint on October 27, 2009.

On October 8, 2009, DCPS filed a document entitled, The Petitioner's Complaint Alleging IDEA Violations before October 8, 2007, is Time-Barred by the IDEA-Prescribed Statute of Limitations, which DCPS intended to serve as a motion for partial dismissal. On or about October 21, 2009, Petitioner filed Petitioner's motion to strike pleading as frivolous, which sought to strike DCPS's motion for partial dismissal. On October 21, 2009, DCPS filed District of Columbia Public School's Response to Petitioner's Motion to Strike DCPS' Motion for Dismissal of Time-Barred Claims.

In the meantime, on October 14, 2009, Petitioner filed a Motion for an Expedited Due Process Hearing. On October 19, 2009, DCPS filed District of Columbia Public School's Opposition Motion to Petitioner's Motion for an Expedited Hearing. On October 20, 2009, the hearing officer issued an Order Granting Petitioner's Motion for an Expedited Due Process Hearing.[3]

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[2] To the extent that certain claims may be redundant and/or closely related, they will be grouped together for purposes of analysis in this HOD. To the extent that certain claims may be irrelevant (due to lack of presentation of evidence or for similar reasons), they will not be taken into consideration by the hearing officer for purposes of rendering conclusions of law.

[3] By email dated October 28, 2009, Petitioner's counsel advised the hearing officer that Petitioner would

On October 22, 2009, Petitioner filed a Motion for Summary Judgment or In The Alternative to Exclude Evidence. On October 30, 2009, Petitioner filed a Supplemental Motion for Summary Judgment or In The Alternative to Exclude Evidence.

On October 29, 2009, the hearing officer conducted the prehearing conference. During the conference, the hearing officer heard arguments and issued rulings on the three outstanding pretrial motions. The hearing officer granted in part DCPS's Motion for Partial Dismissal (the document asserting Petitioner's claims were time-barred), ruling that all claims before January 12, 2006 were time-barred because the Complaint did not include allegations that would bring those claims within the exceptions to IDEIA's two-year statute of limitations, and that Petitioner's claims covering the period between January 12, 2006 and October 7, 2007 would be considered if Petitioner presented sufficient proof during the hearing to bring those claims within one of the exceptions to the statute of limitations.[4] The hearing officer denied Petitioner's Motion to Strike DCPS's Statute of Limitations Pleading as Frivolous, on the ground that the statute of limitations is jurisdictional and can be raised any time, even *sua sponte* by the hearing officer. Finally, the hearing officer granted in part Petitioner's Motion and Supplemental Motion for Summary Judgment or in the Alternative to Exclude Evidence, ruling that DCPS would be limited to the single defense raised in its initial Response. That defense asserted that Student could progress at his DCPS high school with appropriate supports. The hearing officer issued the Pre-Hearing Order on November 3, 2009.

On November 4, 2009, DCPS filed District of Columbia Public School's Supplemental Filing to Parent's Administrative Due Process Complaint.

On November 9, 2009, the parties submitted their Five-Day disclosures, with Petitioner submitting a binder filled with seventy-nine documents (Petitioner's Exhibits 1 - 79) and DCPS submitting thirty-five documents (DCPS-1 through DCPS-35).

A series of due process hearings was held for this case on November 16, 23, and 30, 2009, and December 16 and 17, and 28, 2009. Thereafter, on Petitioner's motion, the matter was continued to January 5, 2009 to allow the parties an opportunity to provide written closing arguments.[5] [6]

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not be able to proceed with the expedited hearing due to the limited availability of its witnesses and the shortened timeframe allowed for completion of expedited hearings. Although Petitioner later mentioned the possibility of fitting itself back into the timeframe for expedited hearings, by agreeing at the prehearing conference to set the hearings for this case for three dates that ended on November 30, 2009, which was well beyond the expedited hearing deadline, Petitioner effectively waived its right to an expedited hearing.

[4] *See* 34 C.F.R. § 300.511(e)-(f).

[5] Additional documents, including briefings and motions, were filed by the parties throughout the course of this case, and the hearing officer issued written Orders, as appropriate, deciding the parties' motions. Although said documents have not been listed herein, all documents filed with the SHO are part of the administrative record for this case.

[6] Subsequent to the closing of the record, Petitioner filed a written rebuttal argument and a Motion for leave to submit Petitioner's rebuttal argument. The hearing officer declined to consider the rebuttal argument and hereby denies the Motion for leave to submit same on the ground that the rebuttal argument and motion were submitted after the record had been closed and after the time for drafting the

## III. ISSUE(S)[7]

Did DCPS violate IDEIA and fail to provide Student with a FAPE by:

1. violating procedures for initial evaluation;
2. violating the reevaluation timelines;
3. violating evaluation procedures;
4. violating requirements regarding review of evaluation data;
5. violating procedures for determination of eligibility;
6. failing to create an appropriate IEP;
7. failing to appropriately implement Student's IEP;
8. failing to ensure the IEP team included the required persons;
9. violating the requirements for parent participation;
10. violating the requirements for development, review and revision of Student's IEP;
11. failing to identify Student's communication impairment;
12. violating Child Find;
13. failing to make the required findings when determining the existence of a specific learning disability;
14. violating the requirements for specific documentation for the eligibility determination;
15. violating the requirements for educational placement determinations;
16. violating by not providing sufficient prior notice;
17. violating the discipline procedures; and
18. violating the procedures for the determination of interim alternative education setting?

## IV. FINDINGS OF FACT

1. As of January 12, 2006, Student was attending grade at a DCPS junior high school, and he had already been determined eligible for special education and related services as a learning disabled student. Although Student had a valid speech and language evaluation at the time, as it had been conducted on February 24, 2004, Student's most recent psychoeducational evaluation had been conducted on July 10, 2002.[8]

2. Student's IEP dated April 21, 2005, which was in effect on January 12, 2006, identified Student as learning disabled and required Student to receive 10 hours of specialized instruction, 1 hour of speech and language services, and .5 hour of psychological services, for a total of 11.5 hours of special education and related services per week. However, the IEP did not contain any present levels of performance, it did not list Student's strengths and weaknesses in the communication and social/emotional/

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HOD had already begun to run. *See* Student Hearing Office Due Process Hearing Standard Operating Procedures, § 401(A) ("A motion is a request that a Hearing Officer rule or make a decision on a particular issue **prior to or during** a hearing") (emphasis added).

[7] *See* fn 2, *supra.*

[8] *See* Petitioner's Exhibits 2, 4, 5, 8.

behavioral areas, and it did not contain any goals in the communication and social/emotional/behavioral areas.[9]

3. Student also had an Intervention Behavior Plan ("BIP") in effect as of January 12, 2006. The BIP was dated December 16, 2005, and it identified the behaviors to be targeted as cursing at peers and teachers, and touching/hitting adults and peers.[10]

4. is an alternative school for students who have been removed from their regular school due to disciplinary issues. is supposed to provide special education services and related services to disabled students who attend school there. From January 30, 2006 through February 21, 2006, Student attended after he had an altercation with one of his teachers at his DCPS junior high school and was suspended. However, Parent never received an invitation to an IEP meeting to discuss the suspension or DCPS's decision to send Student to Student enjoyed attending because it was a different environment from his DCPS junior high school, which he no longer wanted to attend because he was earning poor grades and he was not functioning properly there. provided Student with a small setting, it was structured and strict, and the students had to be escorted everywhere. At there were only 7 to 8 students in each class with 2 adults; whereas his DCPS junior high school was a bigger school, and there were approximately 25 students in his classes. Student was upset when he had to leave and return to his DCPS junior high school. Student's report card from the period when he attended in 2006 reflected that he received Bs in five of his classes and Cs in the remaining two classes.[11]

5. When Student returned to the DCPS junior high school after attending Student's grandmother went up to the school because Parent had to work. The school staff put Student back into the class of the same teacher with whom he had previously had the problem. Grandmother asked for another class for him, but the staff insisted that Student had to go back to the same class.[12]

6. Student's second advisory 2005/06 Progress Report from his DCPS junior high school, dated January 23, 2006, which was prior to his reassignment to indicated that he had earned Ds in his four academic classes, a U in citizenship, and a C in Heath and PE. Similarly, Student's final 2005/2006 Progress Report from his DCPS junior high school revealed that for the third and fourth advisories after Student returned to his DCPS school from Student earned Ds in three of his academic classes, Cs in science and consumer information, a U in citizenship, and Fs in study skills development.

Student walked the halls at his DCPS junior high school, instead of attending classes. He did so because he did not know how to do the work he was being given, and even though he asked for help, there were so many other kids there who also needed extra

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[9] Petitioner's Exhibit 5.

[10] Petitioner's Exhibit 7.

[11] Testimony of current elementary school SEC ("SEC at ES"); testimony of Parent; testimony of Student; Petitioner's Exhibit 9.

[12] Testimony of grandmother.

help.[13]

7. Student's performance on the April 24, 2006 administration of the DC-CAS standardized test resulted in Below Basic scores in both reading and math.[14]

8. On June 7, 2006, DCPS issued another IEP for Student. This IEP identified Student as having a specific learning disability and required him to receive 10 hours of specialized instruction, 1 hour of counseling and 1 hour of speech and language therapy, for a total of 12 hours of special education and related services per week. However, only Student, his guardian (grandmother), a special education teacher and a social worker signed the IEP. There was no indication that a general education teacher and a speech-language pathologist participated in the development of the IEP.[15]

9. Student was promoted to the grade for SY 2006/2007, and he continued to attend his DCPS junior high school. Student's 2006/07 Progress Report for the first advisory revealed that he received Fs in three of his academic classes and art, a D in Health and PE, Cs in mathematics resource and standardized test prep athlete, and an S in citizenship.[16]

10. On November 3, 2006, DCPS prepared a Student Evaluation Plan ("SEP") for Student, which required Student to receive comprehensive psychological, speech/language, and educational evaluations by January 2, 2007. However, the record reveals that Student received a psychoeducational reevaluation on February 28, 2007 and an educational evaluation on April 26, 2007. There is no indication in the record that Student received the required speech/language evaluation at any point during calendar year 2007.[17]

11. The report on Student's February 28, 2007 psychoeducational reevaluation revealed that the following tests were administered to Student as a part of that reevaluation: Wechsler Intelligence Scale for Children-Fourth Edition ("WISC-IV"); Developmental Test of Visual-Motor Integration; Human Figure Drawing; and Incomplete Sentences. The evaluator also conducted a student interview and a record review.

    The evaluator noted Student's school history of academic and speech delays and behavioral concerns. Student's performance on WISC-IV revealed that he had a Full Scale IQ score of 70, which was in the Borderline range of intellectual functioning, Verbal Comprehension Index and Perceptual Reasoning Index scores of 61 and 67, respectively, which were in the Extremely Low range, a Working Memory Index score of 86, which was in the Low Average range, and a Processing Speed Index score of 94, which was in the Average range.

    Student's performance on the remaining assessments administered revealed that his Perceptual/Motor skills were Below Average, with an age equivalent of 10.5 years;

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[13] Testimony of Student; Petitioner's Exhibits 8, 15.

[14] Petitioner's Exhibit 13.

[15] DCPS-21; testimony of Petitioner's expert witness.

[16] Petitioner's Exhibit 19.

[17] *See* Petitioner's Exhibits 20, 26, 29; DCPS-22, DCPS-27, DCPS-28.

his Expressive Language skills were not age appropriate, and his need for repetition and clarification of instructions suggested weaknesses in the input of information presented orally; he presented as an emotionally insecure person who seemed to be having difficulty controlling his impulses; he had a simplistic cognitive approach; and he was emotionally reactive and vulnerable to negative peer associations. Student also admitted engaging in negative behaviors in school, such as skipping classes and being disrespectful to teachers.[18]

12. The report on Student's April 26, 2007 educational evaluation revealed that the WJ-III Tests of Achievement were administered to Student. Student's performance on this assessment resulted in the following grade equivalencies ("GE"): Broad Reading – 5.7 GE; Broad Math – 5.4 GE; Broad Written Language – 4.5 GE; Academic Skills – 6.0 GE. The evaluator noted that when compared with others at his grade level, Student's performance was Low Average in broad reading and math calculation skills; and Low in mathematics, written language, and written expression.[19]

13. Student's 2006/07 Progress Reports indicate that Student had been placed in the following classes during the first advisory: Art I, Biology I, English Resource, Mathematics Resource, Citizenship, Health & PE 9, Standardized Test Prep Athlete, and D.C. History and government. However, by the second advisory and the remainder of the school year, Student had been placed in the following classes: Art I, Science Resource, English Resource, Social Studies Resource, Mathematics Resource, Citizenship, Health & PE 9, and Standardized Test Prep Athlete.

    Student's final 2006/07 Progress Report, dated June 14, 2007, indicated that he received Fs in Art and English Resource, a U in Citizenship, Cs in Science Resource, Social Studies Resource, and Mathematics Resource, and Bs in Health & PE 9 and Standardized Test Prep Athlete. The Progress Report further revealed that Student was absent 0 times from Standardized Test Prep Athlete, 27 times from Health/PE, 38 times from Mathematics Resource, 39 times from Science Resource, 40 times from Social Studies Resource, 42 times from Art I, 52 times from Citizenship, and 67 times from English Resource. Finally, the Progress Report stated that Student had to attend summer school to be promoted to the next grade. However, by letter dated June 7, 2007, Student's DCPS junior high school informed Parent that Student's records/cumulative folder had been forwarded to the local DCPS senior high school.[20]

14. On June 8, 2007, DCPS issued another IEP for Student. This IEP identified Student as learning disabled and required him to receive 10 hours of specialized instruction per week only. The IEP contained no present levels of performance. Despite the report for Student's February 28, 2007 psychoeducational evaluation, which indicated that Student was experiencing communication deficits, as well as social and emotional difficulties/ insecurities, the IEP made no provision for Student to receive speech and language and counseling services. The Meeting Notes for Student's June 8, 2007 MDT meeting

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[18] Petitioner's Exhibit 26; DCPS-28.

[19] Petitioner's Exhibit 29; DCPS-27.

[20] Petitioner's Exhibits 19, 23, 27, 30, 33.

indicated that Student was being exited from counseling services for non-attendance during second semester despite encouragement to attend. Similarly, a June 8, 2007 DCPS Completion of Services Form indicated that Student was exited from counseling due to his refusal of the service during the second semester.[21]

15. Student attended 10th grade at his local DCPS senior high school for SY 2007/08. Student's 2007/08 Progress Report for the first advisory indicated that Student had not been assigned to attend any special education classes. Instead, he had been placed in the following classes for the first advisory: Dynamics of Relationships, Geometry, English II, and Principles of Botany. The Progress Report further indicated that Student had received Fs in all four classes, and that he was absent 9 times from English, 18 times from Dynamics of Relationships, 25 times from Botany, and 31 times from Geometry. Three of his teachers noted that Student's absences were excessive, while the remaining teacher noted that Student had poor behavior and class participation.[22]

16. On December 17, 2007, Student was suspended for 10 days for being in the halls and/or restroom during class time without a pass and disruptive behavior. On March 4, 2008, Student was suspended for five days after being caught in the halls during instructional time.[23]

17. On April 11, 2008, DCPS issued another IEP for Student. Once again, this IEP identified Student as learning disabled and required him to receive 10 hours of specialized instruction per week only, and it made no provision for Student to receive speech and language or counseling services. The IEP contained Student's strengths and weaknesses and present levels of performance in the academic area of math, but the scores listed were from a March 5, 2004 evaluation, which had been conducted four years previously. Although the IEP contained reading goals for Student, it did not list his strengths and weaknesses and present levels of performance in the academic area of reading. This IEP was developed when Student was years old, so it contained a transition plan. The transition plan indicated that Student's post-school goals were to receive computer technology training, become a computer technician and live in his own apartment, but the IEP listed "Student self report" as the age-appropriate transition assessment used to determine Student's post-school goals. The plan also indicated that Student's annual employment and postsecondary education goals were to investigate trade unions and apprenticeship programs, and to investigate trade/vocational schools with programs in computer technology. The plan further provided that Student was to accomplish these goals by conducting internet searches.[24]

18. Student's final 2007/08 Progress Report, which was dated June 13, 2008, indicated that he had received a final grade of F in each of the eight classes he had taken that year. Indeed, every grade listed on the Progress Report, including all grades listed for the

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[21] DCPS-16, DCPS-19, DCPS-32.

[22] Petitioner's Exhibit 36.

[23] Petitioner's Exhibits 37, 39.

[24] Petitioner's Exhibit 40; DCPS-17.

second, third, and fourth advisories, were Fs, with the exception of the U Student received in World History and Geography 1 for the third advisory. None of the classes Student took that year were resource classes. Instead, he had been placed in the following classes that year: Dynamics of Relationships, Geometry, English II, Spanish I, World History and Geography 1, Humities-Step II, Health & PE 10, and Principles of Zoology, which seemingly replaced the Principles of Botany class Student had taken during the first advisory.[25]

19. For the 2008/09 school year, Student was once again placed in the grade at his local DCPS senior high school. He was placed in the following four classes for the first advisory: English II, Algebra 1, World History/Geography 2, and Biology 1. Student's first advisory Progress Report, dated September 24, 2008, indicated that Student needed more study in his classes and there was a possibility he would fail English, Algebra, and World History/Geography.[26]

20. On October 9, 2008, DCPS convened an MDT meeting at Parent's request to discuss Parent's concerns about Student's academic progress. At the meeting, the DCPS psychologist reviewed Student's February 28, 2007 psychoeducational reevaluation, stating that Student had earned a Full Scale IQ score of 70, a Broad Math score of 77, a Broad Reading score of 83, and a Broad Written Language score of 75. The psychologist further stated that Student's academic achievement exceeded expectancy, which meant that he was not learning disabled. When the team recommended exiting Student from special education, Parent accepted the team's decision. As a result, on October 9, 2008, more than 1½ years after Student's February 28, 2007 psychoeducational reevaluation, DCPS issued a Prior Notice stating that Student was no longer eligible for special education services based upon his February 28, 2007 psychoeducational assessment. There was no discussion of whether Student had mastered his IEP goals. Moreover, the Meeting Notes indicated that Parent, Student, a DCPS school psychologist, the SEC, and a special education teacher participated in the meeting. There was no indication that a general education teacher participated in the meeting.

    Parent agreed with the team's decision to exit Student from special education because she was told that Student had earned test scores in the 70 to 80 range, and she believed that meant Student was doing better. Parent is a high school graduate who has no training special education, so Parent did not know, and no one explained to her, that Student's scores meant that he was still performing below average.[27]

21. On October 24, 2008, approximately two weeks after Student had been exited from special education services, DCPS issued a first advisory Progress Report, which indicated that Student had received a D and three Fs as his first advisory grades.[28]

22. Once Student failed most of his classes shortly after he had been exited from special

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[25] Petitioner's Exhibit 42.

[26] Petitioner's Exhibit 43.

[27] Petitioner's Exhibit 45; DCPS-8, DCPS-15; testimony of Petitioner's expert witness.

[28] Petitioner's Exhibit 46.

education services, Parent did not know what to do. She did not know that she could challenge the decision to exit him. She had been trying to figure out for years how to get her son the help he needed. She went to the IEP meetings and sent her mother to the ones she could not attend. She constantly asked what she could do, how the situation could be fixed, and what was actually wrong, but there were rarely any special education or general education teachers at the meetings, and no one was helping her with her son. Moreover, DCPS never gave her any of the procedural forms that are mentioned in Student's records. So, after Student was exited from special education services and then failed his classes, Parent pulled Student from DCPS and sent him to a Military Academy where he had to follow rules, make certain grades, and meet other standards. However, Student failed there because he did not do well at all in terms of his behavior and his grades.

Student's grandmother now realizes that Student did not succeed at the military academy because he could not do the work. He needed more help. However, the grandmother did not realize that Student needed more help at the time Parent sent Student to the academy.[29]

23. On December 10, 2008, the Child Guidance Clinic of the D.C. Superior Court conducted a psychoeducational evaluation of Student. Student's performance on the Wechsler Adult Intelligence Scale-IV ("WAIS-IV") resulted in a Full Scale IQ score of 70, which was in the Borderline range, a General Ability Index score of 69, which was in the Extremely Low range, Verbal Comprehension Index, Perceptual Reasoning Index, and Processing Speed Index scores of 70, 73, and 76, respectively, which were in the Borderline range, and a Working Memory Index score of 83, which was in the Low Average range.

On the WJ-III Test of Achievement, Student earned the following GEs: Broad Reading – 3.9, Broad Math – 5.0, Written Expression 3.3 GE, Academic Skills – 5.7 GE, and Academic Fluency – 3.5 GE. The evaluator noted that Student's scores on the WJ-III subtests were below an age-appropriate and grade-appropriate level. More specifically, Student's passage comprehension score was comparable to that of a 7-year old child, his reading fluency, academic fluency, written expression, and writing fluency scores were comparable to an 8-year old child, his broad reading and writing samples skills were equivalent to those of a 9-year old child, his math fluency and broad math scores were equivalent to a 10-year old child, and his math calculation and academic skills were comparable to those of an 11-year old. At the time of the testing, Student was years old and repeating the grade for the second time.

In light of Student's performance on the WAIS-IV and WJ-III, the evaluator concluded that Student's cognitive difficulties were contributing to his poor grades and academic difficulties. Indeed, as all of Student's skills were substantially below an appropriate level, the evaluator surmised that Student's cognitive functioning was more likely to contribute to his academic difficulties than a learning disorder. The evaluator further stated that Student's "cognitive impairments, poor academic performance, difficulty concentrating and focusing, and emotional problems should qualify him for special education services."

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[29] Testimony of Parent; testimony of grandmother.

Based on the data from emotional and personality testing administered, the evaluator determined that Student suffered from Anxiety Disorder NOS, which is characterized by feelings of anxiety and depression. The evaluator also made the following diagnoses: Adolescent Antisocial Behavior; Cannabis Dependence; and Borderline Intellectual Functioning.[30]

24. The fact that Student's behavioral difficulties in school increased over the years, even as he either was not receiving the intensity of behavioral support services he required or was not receiving any such services at all, likely resulted in feelings of discouragement, frustration and lowered self-esteems, which probably contributed to the development of his anxiety disorder.[31]

25. On May 12, 2009, DCPS convened an MDT meeting to review Student's December 10, 2008 psychoeducational evaluation. After the evaluation had been reviewed, Petitioner's counsel asserted that Student should be determined eligible as a student with a learning disability despite functioning in the borderline range, and that Student had not received the appropriate intervention. Parent and counsel also requested a Vineland adaptive assessment, and a speech and language assessment. The team decided to defer deciding on the requested speech and language assessment until the speech pathologist could compare Student's 2004 speech and language assessment with the 2008 psychoeducational assessment. The team also determined to send Student to the nurse for a hearing screening. The team then tabled the discussion until the assessments had been completed.[32]

26. On May 19, 2009, Parent completed a Student Support Team request form for Student, listing anger problems, reading deficits, attendance and tardiness issues, and behavior problems as the areas of concern.[33]

27. On June 2, 2009, DCPS issued a Speech and Language Reevaluation report for Student. The report indicates that the evaluator conducted a review of Student's history/ background/record, and also administered the Peabody Picture Vocabulary Test – Third Edition ("PPVT-III"), the Expressive One-Word Picture Vocabulary Test-Third Edition ("EOWPVT-III"), and the Clinical Evaluation of Language Fundamental – Fourth Edition ("CELF-IV").

The evaluator's review of Student's records revealed that his most recent speech and language evaluation had been conducted in February of 2004, approximately 5 years earlier. That previous evaluation revealed, *inter alia*, that Student had a deficit in overall spoken language and a mild deficit in receptive vocabulary skills. The previous evaluator concluded that presented with morphological and lexical difficulties, and had slow processing time in which hearing was suspect. A comprehensive audiological evaluation was recommended to rule out hearing difficulties.

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[30] DCPS-26.

[31] Testimony of expert psychologist.

[32] Petitioner's Exhibit 50.

[33] Petitioner's Exhibit 51.

Student's performance on the evaluator's 2009 administration of the PPVT-III resulted in a score of 71, which places him in the Low Range/Moderate Deficit level for receptive vocabulary. Student's performance on the EOWPT-III resulted in a score of 66, which indicates that he has a Severe Deficit in expressive vocabulary skills. Finally, Student's performance on the CELF-IV resulted in a Core Language Index score of 73, which places him in the Low Range with a Moderate Deficit in overall language ability; however, Student's scores of 58 on the Receptive Language Index, 61 on the Expressive Language Index, 58 on the Language Content Index, and 69 on the Language Memory Index reveals that he is in the Low Range of functioning with Severe Deficits in the areas of receptive language, expressive language, language content, and language memory.[34]

28. On June 8, 2009, DCPS conducted an SST meeting for Student. The participants included Parent, Petitioner's counsel, counsel's law clerk, the school principal at Student's DCPS high school at the time, a guidance counselor, and a social worker. The SST team reviewed Student's transcript, reviewed written teacher reports, and discussed Student's hall walking. The team was told that interventions could not be put in place for Student during the summer but would have to start at the beginning of the next school year. The team wanted to know why Student had been exited from special education and how he could be reentered. The principal was of the opinion that the school system was failing Student and he was surprised that an adaptive test had never been administered. The principal was seemingly felt that Student needed to be re-entered into special education before he turned years old. The team agreed that an adaptive functioning test would be performed to see if Student qualified for special education, and the principal directed the SEC to order the test for Student.[35]

29. On June 9, 2009, DCPS conducted an Adaptive Functioning Evaluation of Student by administering Vineland Adaptive Behavior Assessment Scales to Student's art teacher and his grandmother. However, a valid report was not received from the teacher because there were too many "DK" responses. Based on the valid report received from the grandmother, the evaluator determined that Student's overall adaptive functioning is low in light of a composite score of 69. Student received a low adaptive functioning score in the Communication Domain based on adaptive functioning in the low range in the Written Communication subdomain and in the moderately low range in the Expressive Communication subdomain. Student received a moderately low adaptive functioning score in the Daily Living Skills Domain based upon adaptive functioning scores in the moderately low range in the Personal subdomain and the Community subdomain and in the low range in the Domestic subdomain. Student also received a moderately low adaptive functioning score in the Socialization Domain based upon adaptive functioning in the moderately low range in the Interpersonal Relationship subdomain, in the low range in the Coping subdomain, and in the adequate range in the Play/Leisure subdomain. In addition, Student's maladaptive behavior was found to be at the clinically significant level. Overall, the evaluator concluded that Student meets the criteria for Mild Mental Retardation based on his limited cognitive functioning and low adaptive functioning

[34] Petitioner's Exhibit 52; DCPS-35.

[35] Testimony of law clerk.

skills. The evaluator recommended that the MDT develop an IEP to meet Student's needs as a student with Mild Mental Retardation.[36]

30. An IQ of 70 or below is a general requirement for a finding of Mental Retardation ("MR"). Indeed, anytime there is an indication of an IQ score of 70 or below, adaptive behavior testing should be conducted.[37]

31. An adaptive functioning test should have been administered after Student's February 2007 psychoeducational reevaluation to rule in or rule out mental retardation ("MR") in light of his full scale IQ score of 70, which is the beginning cutoff score for MR. Without an adaptive functioning test, Student was receiving whatever services were being given to him without any change in service, whereas the adaptive functioning test would have resulted in a totally different IEP for Student. Now that the adaptive functioning test has been administered, it can be seen that Student needed services to address his speech deficits, socialization, and daily living skills. These are issues that were not addressed by his previous IEPs. And based on the previous FSIQ of 70, it is clear that Student would definitely have had difficulties in class in terms of completing assignments and completing them in a timely manner. Moreover, an MR student's educational needs are totally different from an LD or general education student's needs because of the cognitive and adaptive deficits an MR student has.[38]

32. Student's final 2008/09 Progress Report, which was dated June 15, 2009, indicated that he had received a final grade of F in his English II, Algebra 1 and World History/ Geography 2 classes, and a final grade of C+ in his Art class. As a result, as of the end of SY 2008/09, Student had earned 1.5 credits, consisting of .5 credit for Art in SY 2008/09, .5 credit for Health & PE 9 in SY 2006/07, and .5 credit for Standardized Test Prep Athlete in SY 2006/07. As of the end of SY 2008/09, Student needed an additional 22 credits (Carnegie Units) to graduate.[39]

33. On June 29, 2009, the Child Guidance Clinic of the D.C. Superior Court conducted another Adaptive Functioning Assessment of Student by administering Vineland Adaptive Behavior Scales and the Adaptive Behavior Assessment System-Second ("ABAS-II") to Student's mother and grandmother. Based on the data obtained via the Vineland Adaptive Behavior Scales, the evaluators determined that Student rated at the Low adaptive level on the Communication Domain (score = 63) and Daily Living Skills Domain (score = 65), and at the Moderately Low adaptive level on the Socialization Domain (score = 76). The data obtained on the ABAS-II resulted in an Extremely Low rating within the Conceptual Domain (score = 63), a Below Average rating within the Social Domain (score = 80), and a Borderline rating within the Practical Subdomain (score = 79). Based on these ratings, along with Student's test results on the WAIS-IV administered in December 2008, the evaluators determined that Student meets the

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[36] Petitioner's Exhibit 56; DCPS-23.

[37] Testimony of expert psychologist.

[38] Testimony of school psychologist.

[39] Petitioner's Exhibits 55, 57; DCPS-4.

diagnostic criteria for Mild Mental Retardation. The evaluators also noted that Student shows a significant number of challenges in adaptive functioning, including the lack of Functional Academic Skills.[40]

34. On July 17, 2009, DCPS convened another MDT meeting for Student. The Meeting Notes state that a June 8, 2009 meeting had previously been held, at which Parent was informed that based on the speech and language reevaluation conducted by a DCPS speech pathologist subsequent to the May 12, 2009 meeting, Student did not qualify for speech and language services. The team reviewed the adaptive functioning assessments that had been conducted in June 2009 by DCPS and the D.C. Superior Court, noting that each assessment report "suggested" the presence of Mild Mental Retardation. The team ultimately determined Student eligible for special education as a student with Mild Mental Retardation. Parent and Petitioner's counsel requested a private placement, and the team determined to reconvene on August 4, 2009 at 10 am. In the interim, Petitioner's counsel and the SEC were to email DCPS's Cluster Supervisor about having a representative attend the meeting to discuss placement. The Meeting Notes indicate that Parent, Petitioner's counsel, counsel's law clerk, the SEC, and a school psychologist were the only participants in the meeting.

    At the time of the meeting, Parent did not understand what mild MR meant. She knew only about severe MR, so Petitioner's counsel had to take parent out to the hall and explain mild versus severe MR and the whole spectrum of the condition. Upon returning to the MDT meeting, Parent asked the SEC and other DCPS team members why they never explained the condition to her before, but no one answered her.[41]

35. On August 4, 2009, DCPS issued a new IEP for Student that identified his primary disability as Mental Retardation and required him to receive 26.5 hours of specialized instruction and 1 hour per week of behavioral support services, for a total of 27.5 hours per week of special education and related services in an out-of-general education environment. The IEP contains present levels of educational performance, baseline data, and annual goals in the areas of mathematics, reading, written expression, adaptive/daily living skills, and emotional, social, and behavioral development. The IEP contains a post-secondary transition plan, which contains long-range goals and interests based upon recent assessments and an interview, as well as annual goals to be met by using the DCPS general curriculum and listed post-secondary transition activities and services. The plan further indicates that Student is expected to obtain a high school diploma. The IEP was signed only by Petitioner's counsel, an advocate, and a social worker, but the IEP indicates that Parent, Student, and the SEC also attended the IEP meeting. There is no indication that a general education teacher and a special education teacher participated in the development of the IEP.[42]

36. Student's August 4, 2009 IEP does not contain enough goals in the Adaptive/Daily Living domain, as there is only one goal. Moreover, Student needs speech and language

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[40] Petitioner's Exhibit 58.

[41] Petitioner's Exhibit 59; testimony of Student.

[42] Petitioner's Exhibit 60; DCPS-12; testimony of Petitioner's expert witness.

evaluation information and goals on the IEP, as that whole domain is not addressed. With respect to the simulated apartment called for in the transition plan, the IEP should expressly state what skills Student should master because that is a very large domain that is not really addressed by the IEP.[43]

37. On August 10, 2009, DCPS high school Student was attending at the time prepared a Placement Review Summary Document, which stated that Student would attend a special class, defined as either a self-contained special education classroom or a special program within a general education school, instead of going to a separate school. The DCPS Cluster Supervisor for senior high schools and special education completed the form by indicating that the MR Cluster program at a DCPS senior high school is able to implement Student's IEP. Although the Cluster Supervisor also indicated that a site visit was conducted on August 10, 2009, there was no site visit because school was not in session in early August. That date was simply added to the form to indicate that school was not in session.[44]

38. On August 21, 2009, DCPS convened another MDT meeting to discuss placement, issue a Prior Notice of Placement for Student to attend the MR Cluster program identified in the August 10, 2009 Placement Review Summary Document, review Student's August 4, 2009 IEP, and address Parent's concerns about placement. The Meeting Notes indicate that Parent and the advocate did not agree with DCPS's placement decision and continued to request a private placement either as an assigned location of services or as compensatory education. In particular, Petitioner's attorney was concerned that the assigned school did not have a school sponsored supported employment program with a history of students, or a simulated apartment program. Nevertheless, DCPS issued the PNOP and the meeting was adjourned.[45]

39. Student's August 24, 2009 Student Timetable from the DCPS senior high school he was assigned to attend indicates that he was placed in the following classes for the first semester of SY 2009/10: Band I, Concepts of Physical Science A, Writing Resource SC, English Language SC HS, Math Resource SC HS, Basic Skills A, and Func Living Skills SC.

    However, as of October 13, 2009, Student had been placed in the following classes: Band I, English I A, Algebra I A, Basic Skills A, Health & PE, Engl Lang SC HS, and Func Living Skills SC. Student's schedule was changed as a result of his MDT meetings.[46]

40. According to DCPS's website, Student's current DCPS senior high school is 271,300 square feet, with 4 floors and a capacity to accommodate 1100 students.[47]

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[43] Testimony of school psychologist.

[44] Petitioner's Exhibit 61; DCPS-7; testimony of cluster supervisor.

[45] Petitioner's Exhibit 63.

[46] Petitioner's Exhibit 64; DCPS-5; testimony of SEC.

[47] Testimony of investigator.

41. Parent has visited Student's current MR cluster program since he has been attending, and she found that other students in the program were deformed, one needed oxygen, and another needed medicine. Many of the students called out Student's name a lot. Student has not done well in the program at all, and Parent doesn't think the school can meet Student's needs because nobody's putting forth the effort to help him stop walking the halls and get his work done. In addition, the school is so huge that it takes Student so long to get from one class to another that he is never on time for his classes.

    Parent wants Student to obtain a high school diploma, get a job of his own and his own place to live. She wants to see her son establish himself.

    Student does not believe he will do well at his current DCPS high school because he feels the school is just like his old DCPS junior high school where he made poor grades and had so many behavior problems. Student is trying to avoid having those problems again. He wants to go to a school where he can do well.[48]

42. Student has not been receiving one hour per week of counseling services at his current DCPS school. Student did not initially begin receiving services until on or about September 24, 2009. Although the social worker tried to "double up" on Student's services after September 24th, Student has not received all of his services, often due to Student's absences.[49]

43. Student's functional living skills teacher at his current DCPS school is also his math resource teacher and his case manager. In the functional living skills class, there is a simulated apartment that was put in place approximately two weeks prior to the due process hearing in this case to allow Student and others hands-on experience, and there is also classroom instruction, which is based on three different textbooks that address issues such as budgeting money, buying a wardrobe with a set amount of money, and preparing a resume on a computer. However, Student does not have one of the textbooks, so copies of the pages are made for him.

    The functional living skills class has also gone on a number of trips outside of the school. For example, they have taken the Metro to a station downtown after purchasing fare cards, and they have gone to Special Olympics bowling. Student has not been allowed to participate in these activities because he is an inclusion student and the school staff does not want to take him away from his general education classes. The students also went to the disability office for a full day and shadowed a mentor, but Student was not allowed to go because he failed to bring in a permission slip.

    Student's current DCPS school does not offer an ongoing supported employment program. Instead, the functional living skills teacher simply takes the students on trips when the occasion comes up.[50]

44. Student's English class at his current DCPS school is an LD class for learning disabled students. The teacher does not know the difference between an LD class and an MR class, and she does not know if she has a copy of Student's IEP because it is not a very

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[48] Testimony of Parent; testimony of Student.

[49] Testimony of Student; testimony of social worker; DCPS-24; Petitioner's Exhibit 73.

[50] Testimony of functional living skills teacher.

helpful document in her opinion. There is a special education teacher who comes to the English class as her schedule allows, which means she is probably there for the whole class approximately 80 percent of the time. The English teacher meets with the special education teacher once per week to discuss issues and ideas and get feedback, and the special education teacher modifies the English teacher's lesson plans for different students because there is a wide range of ability levels in the class. However, the English teacher and the special education teacher never discuss Student's IEP, the English teacher has never met with Student's case manager, and the English teacher has never submitted progress reports concerning Student's IEP goals. There is no behavior staff or behavior support staff in the English class, and the school social worker is not called into the class to process with students when they act out. There are 12 students assigned to the class, but due to student absences, there are only 7 to 8 students in the class 95 percent of the time. Student's attendance is up and down, with the result that he is either tardy or absent approximately 50 percent of the time.[51]

45. At present, Student is currently taking the following four non-pass/fail Carnegie unit courses at his DCPS high school: English, Algebra, Band, and PE, which would provide him with 3.5 Carnegie units. Student would also be able to earn Carnegie units for his math and English resource classes, but those would have to count as elective credits. To obtain the remaining Carnegie units he needs to graduate, Student would either have to enroll in all general education non-pass/fail courses in the coming years, or his current DCPS high school would have to develop specialized classes for him that offer general education content but are comprised of only special education students. The school can do this for Student.

    None of Student's current classes have more than 13 students in them, with some having as little as 8 or 9 students. There are also 2 adults in each class – a special education teacher and a paraprofession, and there is also a general education teacher in Student's math and English classes, which makes a total of 3 adults in those classes. The paraprofessionals are supposed to go to all classes with the students, including PE.

    Although Student is not currently receiving speech and language services, there is a speech/language therapist who works at the school on Wednesdays through Fridays, and Student can be added to her caseload. The school's school-supported employment programs consist of (i) a program for students who can take a ½ day class schedule that is run by a local corporation; (ii) the services offered through the Rehabilitation Services Administration; (iii) and the D.C. Summer Youth Employment Program. The only self-contained vocational course the school offers is Band.[52]

46. By letter dated August 28, 2009, Student was accepted for admission into the high school program of a private, full-time special education school located in Maryland. In making the admissions decision for Student, the school's staff reviewed a packet of Student's educational records, conducted a pre-admission interview Parent and Student, provided Student with a language-based tour, and visited Student at his current DCPS school prior to determining that the private school can meet Student's educational needs.

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[51] Testimony of general education (English) teacher.

[52] Testimony of SEC.

The school offers small class sizes with a maximum of 9 students per class with a teacher and an assistant teacher. Student would be placed in a grade class. Approximately 1/3 of the schools students are Mentally Retarded. The school has State certified teachers, a school-wide reading program, a behavior department with a six-member staff that includes licensed social workers, a support area where students are provided with work and the opportunity to talk, speech pathologists who help develop students' educational programs, and a career education department with three staff members, two of whom are job coaches that go off campus with students to their jobs. The school offers an independent living program, which prepares students for activities such as planning meals and preparing for work, as well as a computer lab and vocational courses in areas such as woodworking, office skills, and entrepreneurship. The school also utilizes a behavior management plan that offers varying privileges at different levels. Moreover, the school allows students only two minutes to get to class on time, and staff members are posted in the hallways during transitions between classes.

The school is located approximately 40 minutes away from the District of Columbia, 60 of its 130 students are from the District, and the typical length of the bus ride to the school for a DCPS student is 1 hour. The cost of the program is approximately $30,000 excluding fees for related services and ESY. The school offers both diploma and certificate tracks, and students determine at the end of the 11th grade year which track they will pursue. It is unclear whether Student would earn sufficient credits to graduate on the school's normal diploma track; however, an individualized program can be designed for Student to help him earn the necessary credits, and Student would be allowed to stay at the school and pursue his diploma through age 21.[53]

47. On September 1, 2009, an independent Speech-Language Assessment was administered to Student. Upon reviewing Student's previous evaluations, the evaluator noted, *inter alia*, that the variability in language abilities reflected in Student's performance on the subtests administered as part of his May 2009 speech-language evaluation is suggests possible problems in auditory processing of information, especially as some of Student's receptive abilities are lower than his expressive abilities.[54] The evaluator administered various independent tests from the Comprehensive Assessment of Spoken Language ("CASL") to Student, as well as the Listening Comprehension Test for Adolescents ("LCTA").

Based on Student's performance on the assessments administered, the evaluator concluded that although Student has no deficits in the areas of speech production, voice or fluency, he has severe deficits in both language knowledge and language processing areas. Moreover, the significant variability found on all the language areas assessed, with scores ranging from severely deficient to very normal, is consistent with an adolescent with a processing deficit such as an auditory processing disorder.

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[53] Petitioner's Exhibit 65, testimony of private school Program Director.

[54] The evaluator also opined that Student's possible auditory information processing deficits were raised in his 2002 speech-language report, because that report stated that Student exhibited slow processing and problems felt to be related to hearing. However, a review of Student's previous evaluations reveals that said comment was included in Student's 2004 speech-language evaluation report, and no such comment was made, nor was any analysis to support such a comment conducted, in connection with Student's 2002 speech-language evaluation report. *See* Petitioner's Exhibits 2, 4; DCPS-29.

The evaluator recommended a comprehensive auditory information processing assessment and audiological evaluation for Student. The evaluator further stated that because of Student's pervasive deficit in all areas of language abilities and language processing, he needs daily, intensive speech-language work services and an educational placement that provides a language-based class with a language-based curriculum. The evaluator also stated that language-based cognitive assessments should not be used to assess Student's IQ and recommended a clinical psychological or neuropsychological evaluation that includes a non-verbal IQ assessment for Student.

The evaluator has consulted at the private school that recently accepted Student for admission, and the evaluator has also worked with the speech-language pathologists at the school and provided in-training service there. The evaluator is of the opinion that the program offered by the school can meet Student's needs.[55]

48. A comparison of Student's scores on the subtests of the CASL administered in his 2004 speech-language evaluation, which was still in current on January 12, 2006, with the same CASL subtest scores administered in Student's September 2009 speech-language assessment reveals that a decline in scores. Hence, Student's standard score on the Grammatical Morphemes subtest decreased from 78 in 2004 to 59 in 2009, his score on the Sentence Comprehension subtest decreased from 90 in 2004 to 75 in 2009, his score on the Nonliteral Language subtest decreased from 82 in 2004 to 69 in 2009, and his score on the Pragmatic Judgment subtest decreased from 93 in 2004 to 73 in 2009.

Moreover, the 2004 evaluator concluded that Student's CASL test results indicated morphological and lexical deficits and noted that Student's processing of information was generally slow and his hearing was suspect. The evaluator recommended a comprehensive audiological assessment for Student, but it does not appear from the record that DCPS followed-up on the recommendation.[56]

49. In October of 2009, DCPS conducted an FBA for Student to address his attendance problems, as well as his defiance, late assignments, and at least one other problem that is unclear because the right side of each page of the FBA is missing. Despite the missing information, it is clear that the team concluded in the FBA that Student engaged in the targeted behaviors because of his desire to be transferred out of DCPS.[57]

50. The administrative record also contains another FBA that seems to have been completed for Student in October of 2009. This FBA targets Student's attendance and punctuality problems. Once again, the team concluded that the targeted behaviors were due to Student's determination to be transferred out of DCPS.[58]

51. On October 21, 2009, DCPS convened another MDT meeting for Student, at which one of the recently created FBAs was reviewed. Student's teachers indicated that he had begun to attend his classes and was doing well. Student stated that he felt he was doing

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[55] Petitioner's Exhibit 67; testimony of expert audiologist/speech-language pathologist.

[56] *See* DCPS-29, Petitioner's Exhibits 4, 67.

[57] Petitioner's Exhibit 70.

[58] DCPS-25.

well, and that he was doing what was necessary to have good grades when he left to go to the private school he had recently visited.[59]

52. On November 4, 2009, DCPS prepared a proposed Settlement Agreement that includes a compensatory education plan, which DCPS continues to offer as compensatory education in this case. The plan would provide Student with a laptop computer with 1 piece of math software and Inspiration software, 3 hours per week of tutoring for 12 months through an independent provider of Parent's choice, 2 hours per month of mentoring for 12 months through an independent provider of Parent's choice, up to 6 credits through an online or site-based credit recovery program of Parent's choice, and 4 computer training or other pre-vocational courses through a community program or school of Parent's choice.

    DCPS is offering the plan to compensate Student for the services he missed after he was exited from special education in October 2008, as well as the retentions, failing grades, educational deficits as reflected by previous test scores, attendance issues, and behavior problems he has experienced over the past few years. DCPS is trying to view Student holistically and give him what he will need to move forward with the current programming being provided at his DCPS high school. DCPS considered Petitioner's desire for a private placement in fashioning the compensatory education plan.

    Parent is of the opinion that a computer and the other items proposed will not help Student to obtain a diploma, get a job and move out on his own, which is what she wants for him. She does not want her son to become another statistic.

    Similarly, DCPS's school psychologist opined at the due process hearing that the plan should be more geared towards adaptive functioning. Student does not necessarily need computer courses; instead, he should be given hands-on training.[60]

53. In November of 2009, an independent report that purports to be a "Psychology Assessment" report was issued for Student. However, the report essentially contains the issuing psychologist's opinions of Student's educational history and present educational needs based on her review of Student's previous assessments and some of his educational records, as well an her interview of Student with Parent present and her observation at the private school that accepted Student in August 2009. The psychologist did not administer any tests to Student.

    The psychologist is of the opinion that because Student did not receive any behavioral support services from DCPS between 2007 and 2009, despite his increasing behavioral problems in school, he now requires (i) a behavioral support plan that addresses both the academic and behavioral skills to be developed, and (ii) intensive counseling services that connect his behavioral choices to his success or lack of success in school.

    The psychologist has visited both Student's current DCPS senior high school and the private school that recently accepted Student for admission. The psychologist does not think that the DCPS school can meet Student's needs because he requires more intensive services than the school can provide. The psychologist believes that the private

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[59] Petitioner's Exhibit 71; DCPS-11.

[60] DCPS-2; Petitioner's Exhibit 72; testimony of Parent; testimony of school psychologist.

school is more likely to be able to provide Student the remediation services he needs because it is a smaller, very structured program with more supervision, a school-wide behavior plan as well as individualized behavior plans where needed, licensed counselors and social workers, smaller class sizes, and adaptive functioning and prevocational/vocational programs.[61]

54. On November 11, 2009, Student received independent combined Audiological and Auditory Information Processing Assessments. Based on Student's performance on the audiological (hearing) test, the evaluator concluded that Student does not suffer from hearing loss. Based on Student's performance on the auditory information processing test, the evaluator concluded that Student has no deficits in the areas of auditory awareness and recognition of sound and speech, auditory hypersensitivity, auditory extraction at the speech sound or phonemic level of processing, general auditory attention and auditory distractibility, auditory memory span or recall, and auditory organization and sequencing.

    On the other hand, the evaluator determined that Student does have deficits in the areas of auditory phonemic extraction at the level that allows for manipulation of phonemes for auditory phonemic awareness tasks, that Student has problems getting information into short-term, auditory working memory, and that Student has problems with auditory integration at both the phonemic level and the lexical level. The evaluator noted that Student's deficits with auditory phonemic extraction and integration would contribute to problems with reading decoding, reading rate and fluency, reading comprehension and spelling. The evaluator further noted that Student's deficits with auditory lexical integration contribute to his language and language processing problems, as well as his listening and reading comprehension deficits. Based on these findings, the evaluator concluded that Student has an auditory learning disability.

    The evaluator recommended that a program of auditory phonemic awareness training be provided to Student and set forth four specific goals in the area of auditory phonemic awareness to address Student's auditory phonemic extraction and integration deficits. The evaluator also recommended that Student receive speech-language services from a speech-language pathologist experienced in working with adolescents with auditory integration deficits, and the evaluator listed three specific goals to address Student's auditory lexical integration deficits.[62]

## V. CONCLUSIONS OF LAW

As the party seeking relief in this case, Petitioner bears the burden of proof. *See* 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

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[61] Petitioner's Exhibit 76; testimony of expert psychologist.

[62] Petitioner's Exhibit 77.

### 1. Statute of Limitations

The hearing officer previously ruled in the November 3, 2009 Pre-Hearing Order issued in this case that Petitioner's claims covering the period between January 12, 2006 and October 7, 2007 would be considered herein upon the condition that Petitioner presented proof during the hearing sufficient to bring those claims within one of IDEIA's exceptions to its statute of limitations. IDEIA provides a two-year statute of limitation that applies to a Petitioner's Complaint unless the Petitioner was prevented from filing the Complaint due to 1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the Complaint; or 2) the LEA's withholding of information from the parent that was required to be provided. *See* 34 C.F.R. § 300.511(e)-(f).[63]

In this case, Petitioner claims stemming from January 12, 2006 through October 2007 concern DCPS's alleged placement of Student at without first conducting a manifestation determination, and various alleged violations with respect to MDT meetings, evaluations, IEPs and related matters. There is no evidence of record that a manifestation determination review was held before DCPS reassigned Student to attend despite DCPS witness testimony to the effect that such meetings are always held prior to reassignments to Moreover, although there are one or more Receipts for procedural manuals in the record that were signed by Parent, Parent convincingly testified that she never received any such procedural forms, and DCPS failed to introduce testimony demonstrating otherwise. Parent further testified that she has no training in special education and only has a high school diploma, and that she attended every MDT meeting she could and repeatedly asked what was going on with her son and how she could go about getting him the help he needed but was never given any concrete answers. Under these circumstances, the hearing officer concludes that Petitioner presented sufficient evidence at the hearing to bring its claims within the "withholding of information" exception to IDEIA's two-year statute of limitations. As a result, the hearing officer will consider herein Petitioner's claims dating back to January 12, 2006.

### 2. Evaluations and Reevaluations[64]

Petitioner has alleged that DCPS violated reevaluation timelines and violated evaluation procedures. The implementing regulations for IDEIA contain an entire subsection that set forth very specific requirements for evaluations and evaluations. *See* 34 C.F.R. §§ 300.301 – 300.306. Hence, for example, DCPS must conduct reevaluations for a disabled child at least once every

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[63] DCPS asserts in its closing statement that the LEA's actions that prevented a parent from filing a Complaint must have been intentional, citing to *C.H. v. Board of Education of Shenendehowa Central School District*, 2009 WL 3326627 (C.A.2 (N.Y.) 2009). However, the cited case concerns claims that arose "before the IDEA was amended, effective July 2005, to include a two-year statute of limitations," with the result that the court utilized the most analogous state statute of limitations to determine the timeliness of Petitioner's claim. *C.H.*, 2009 WL 3326627 at *1.

[64] The hearing officer declines to address Petitioner's claim regarding initial evaluation procedures as Student's initial evaluation took place well before the time period under consideration in this case, and to the extent Petitioner complains about the period after Student had been exited from special education, the hearing officer will address that under Petitioner's claim that DCPS improperly exited Student from special education services.

three years, unless the parent and DCPS agree otherwise. 34 C.F.R. § 300.303(b)(2). Similarly, DCPS must also use a variety of assessment tools and strategies to gather relevant information about the child and ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the child's disability classification. 34 C.F.R. § 300.304(b)(1) and (6).

The evidence in this case is replete with instances of DCPS's violations of IDEIA's requirements for evaluations and reevaluations. Hence, as of January 12, 2006, Student did not have a valid psychoeducational reevaluation in place because his last such evaluation had been conducted more than three years previously. Moreover, DCPS did not conduct a psychoeducational reevaluation to Student until February 28, 2007. Similarly, although Student's February 24, 2004 speech and language evaluation expired three years later on or about February 24, 2007, DCPS did not conduct a speech and language reevaluation for Student until May 27, 2009, more than two years later. In the interim, Student initially received speech and language services based on outdated evaluations. Thereafter, as of June 8, 2007 and continuing into the present, Student's IEPs no longer made provision for him to receive speech and language services.

The evidence in this case also proves that DCPS repeatedly failed to ensure that Student's evaluations were sufficiently comprehensive to identify all of his special education and related service needs. For example, although Student's February 24, 2004 speech and language evaluation recommended a comprehensive audiological evaluation for Student, such an evaluation was not conducted until November 9, 2009, when Petitioner obtained an independent audiological evaluation for Student with DCPS's consent. Similarly, although Student's February 28, 2007 psychoeducational reevaluation found that Student's FSIQ score was 70, the cutoff score for mental retardation, DCPS failed to conduct an adaptive functioning evaluation of Student to rule in or rule out mental retardation until June 11, 2009. Once the appropriate evaluation was finally administered, it was determined that Student is mildly mentally retarded and should have been receiving appropriate services for that disability all along.

Under the circumstances of this case, as outlined above, DCPS's procedural violations with respect to Student's evaluations and reevaluations impeded Student's right to a FAPE and caused a deprivation of educational benefit. As a result, the hearing officer concludes that Petitioner met its burden of proving a denial of FAPE with respect to these claims. *See* 34 C.F.R. § 300.513(a)(2).

### 3. MDT Meeting-Related Violations[65]

Petitioner has alleged that DCPS violated requirements regarding review of evaluation data, violated procedures for determination of eligibility, failed to ensure the IEP team included the required persons, and violated the requirements for development, review and revision of Student's IEP.

Under IDEIA, a child's IEP team must include the parents, at least one of the child's special education teachers and at least one of the child's regular education teachers, if applicable, an

[65] The hearing officer declines to address Petitioner's claim that DCPS violated the requirements for parent participation, as there was absolutely no evidence presented regarding that claim.

LEA representative, an individual who is able to interpret evaluation results, other individuals with special expertise, where appropriate, and the child, whenever appropriate. 34 C.F.R. § 300.321(a). Moreover, IEPs must be reviewed at least annually to determine whether the goals are being achieved and must be revised, as appropriate, to address, *inter alia*, any lack of expected progress toward the goals and the results of any reevaluations conducted. 34 C.F.R. § 300.324(b)(1).

With respect to eligibility determinations, IDEIA provides that such determinations must be made by a group of qualified professionals and the child's parents. 34 C.F.R. § 300.306(a)(1). In addition, the public agency must draw upon information from a variety of sources, including, *inter alia*, evaluations, parental input, and the child's adaptive behavior. 34 C.F.R. § 300.306(c)(1)(i). On the other hand, a student may not be exited from special education services unless the public agency had conducted an evaluation of the child that, *inter alia*, includes a variety of assessment tools and strategies. *See* 34 C.F.R. § 300.305(e).

In this case, the evidence bears out several of Petitioner's claims. For example, the evidence proves that DCPS conducted IEP/MDT meetings for Student on June 7, 2006, April 11, 2008, and August 4, 2009 without convening a full IEP team, which significantly impeded Parent's opportunity to participate in the decision-making process at those meetings by depriving her of the opportunity to hear qualified experts analyze Student's educational performance and needs.

Furthermore, the evidence in this case proves that DCPS exited Student from counseling services at his June 8, 2007 meeting due to Student's refusal to attend the services during the second semester of SY 2007/08 without even discussing whether Student had mastered his counseling goals, what his anticipated needs were with respect to counseling, and whether positive behavioral interventions and supports and strategies could be used to address Student's uncooperative behavior. *See* 34 C.F.R. § 300.324(b). As a result, DCPS ceased providing Student with counseling services even as his behavioral difficulties in school were increasing and negatively impacting his academic progress.

In addition, on October 9, 2008, DCPS exited Student from special education services based on the results of a single psychoeducational evaluation that had been conducted more than 1½ years previously, with the result that Student did not receive special education services from October 9, 2008 through July 17, 2009, when DCPS determined that he was mildly MR. And even then, the only participants at the July 17, 2009 eligibility meeting were Parent, Petitioner's counsel, counsel's law clerk, a school psychologist and the SEC, and the sole evaluation considered was a June 11, 2009 adaptive functioning evaluation. As a result, Student's most recent psychoeducational and speech and language reevaluations were not reviewed, and Student's resulting IEP did not include speech and language services, which impeded Student's right to a FAPE and caused a deprivation of educational benefit.

Under these circumstances, the hearing officer concludes that Petitioner met its burden of proving that DCPS denied Student a FAPE by failing to comply with IDEIA requirements regarding the conduct of IEP/MDT meetings. *See* 34 C.F.R. § 300.513(a)(2).

**4. <u>IEP-Related Violations</u>**

Petitioner has alleged that DCPS failed to create an appropriate IEP and failed to appropriately implement Student's IEP. Under IDEIA, a child's IEP must include, *inter alia*, a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum, as well as a statement of measurable annual goals. 34 C.F.R. § 300.320(a)(1)-(2). However, the evidence in this case reveals that several of Student's IEPs failed to contain present levels of performance, indications of Student's strengths and weaknesses in relevant areas, and sufficient goals, if any goals were contained in the IEP for a particular area at all. *See* Findings of Fact 2, 17, 36. Moreover, the evidence in this case demonstrates that Student's current IEP is also inappropriate for failure to include speech and language services.

The United States Supreme Court has held that the FAPE required by IDEIA is "tailored to the unique needs of the handicapped child by means of an individualized educational program." Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Yet, in this case, the evidence proves that Student's IEP is not being fully implemented because he currently is not receiving all of the counseling and transitional services required under his IEP. Furthermore, the SEC at Student's current school testified that the only self-contained vocational class the school can offer Student is Band, which he is already taking, and the only school-supported employment program would require Student to be away from school for ½ of the school day, which is not feasible given the meager number of Carnegie units Student has managed to earn to date.

Based on this evidence, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to create appropriate IEPs for Student and failing to appropriately implement Student's current IEP.

### 5. Disability Determination/Classification[66]

Petitioner has alleged that DCPS failed to identify Student's communication impairment, failed to make the required findings when determining the existence of a specific learning disability, and violated requirements for specific documentation for the eligibility determination.

As for Petitioner's claim regarding the lack of required findings and documentation in connection with the determination that Student had a specific learning disability, the hearing officer finds that Petitioner failed to prove this claim as it presented no testimonial or documentary evidence on the claim, except an IEP listing SLD as Student's disability classification.

With respect to Petitioner's claim that DCPS failed to identify Student's communication impairment, the hearing officer notes that the evidence of record tends to prove that had DCPS followed up with the comprehensive audiological evaluation of Student recommended in his 2004 speech and language evaluation, it would have discovered Student's communication

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[66] The hearing officer declines to address Petitioner's Child Find claim as absolutely no evidence was introduced regarding same. *See also* fn 64.

impairment. Indeed, DCPS acknowledges that Student should be receiving speech and language services now and should have received same previously. *See* DCPS closing statement at 3.

Under these circumstances, the hearing officer concludes that Petitioner met its burden of proving that DCPS denied Student a FAPE by failing to identify Student's communication impairment, but failed to meet its burden of proof with respect to its claim regarding the specific learning disability determination.

**6. Placement**

Petitioner has alleged that DCPS violated the requirements for educational placement determinations. Upon a review of Petitioner's closing statement, it appears that Petitioner asserts with respect to this claim that DCS failed to take Parent's input into account in determining to place Student in his current DCPS high school. To the contrary, however, the evidence in this case demonstrates that Parent and counsel repeatedly made known Parent's desire that Student be placed in a private special education school, and DCPS declined to honor that request. As a result, the hearing officer concludes that Petitioner failed to meet its burden of proof on this claim.

**7. Prior Notice**

Petitioner argues in its closing statement that DCPS failed to provide notice when it placed Student at when his speech and language services were terminated, and when it refused to place Student at . The hearing officer agrees that no such notices are found in the record for this case. However, absent evidence or argument demonstrating how the lack of such notice resulted in one or more of the three results set forth at 34 C.F.R. § 300.513(a)(2), the hearing officer is unable to conclude that the lack of such notices resulted in a denial of FAPE.

**8. Disciplinary Procedures**

Petitioner has alleged that DCPS violated the discipline procedures and violated the procedures for placement in an interim alternative education setting. The hearing officer acknowledges that the evidence in this case tends to prove that DCPS failed conduct an manifestation determination review prior to reassigning Student to However, the evidence in this case also proves that Student's reassignment to was beneficial in that he was placed in a small, structured environment where he performed very well. Indeed, there is evidence in this case that Student received his highest grades to date at and he was upset when he had to leave and return to his DCPS junior high school. Under these circumstances, the hearing officer is unable to conclude that DCPS's failure to comply with the required disciplinary procedures prior to sending Student to resulted in a denial of FAPE.

### 9. Relief to be Awarded

In this case, Petitioner has requested a private placement for Student as compensatory education for the many denials of FAPE Student has suffered since January 12, 2006.

Under the theory of compensatory education, courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005). "Compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid*, 401 F.3d at 518. Moreover, "[I]n every case, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d at 524; *Schaffer et al v. Weast et al*, 546 U.S. 49, 126 S.Ct. 528 (2005).

The evidence in this case demonstrates that Student has suffered through a series of denials of FAPE throughout his academic career, including misdiagnosis, which resulted in his receipt of inappropriate and insufficient services, and the removal of counseling and speech and language services from his IEP in the face of his daily behavioral and academic performance which suggested that he desperately needed such services. In addition, Student was inappropriately exited from special education on the basis of a single evaluation, at a time when what he actually required was more intensive services to combat his academic, adaptive, communication, and behavioral deficits, and he suffers from severe communication deficits that have never been discovered or addressed by DCPS.

The hearing officer has also concluded that Student's current location of services is not fully implementing his IEP, and the evidence in this case demonstrates that Student's current DCPS school lacks the present ability to provide all of the services he requires under his IEP. On the other hand, Student has been accepted for admission into a private school that can provide him with the intensive remedial instruction and related services he will require to begin to reverse the effects of the series of denials of FAPE he has suffered at the hands of DCPS.

Under these circumstances, the hearing officer concludes that an award of the requested private placement is appropriate in this case as a form of compensatory education, as well as to ensure that Student is provided a FAPE going forward in light of the fact that his current DCPS school does not have the present capability to implement his IEP. *See Diatta v. District of Columbia*, 319 F.Supp.2d 57 (D.D.C. 2004) (award of prospective private educational program was appropriate where student had been repeatedly misdiagnosed and mishandled by DCPS, and Student's current placement and educational program were not appropriate).

## VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proof its entitlement to the requested private placement.

## VII. ORDER

1. Within 10 school days of the issuance of this Order, DCPS shall begin providing Student with funding for, and transportation to and from, the full-time private school that has accepted Student for admission into its program.

/s/ *Kimm H. Massey*
Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 15th day of January, 2010.

**NOTICE OF APPEAL RIGHTS**
This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).